2. Respondents filed suit alleging, *inter alia*, that the posters and Nuremberg Files were unlawful threats of force under the FACE Act, 18 U.S.C. 248. Pet. App. 6a-7a. The FACE Act provides civil remedies as well as criminal penalties against anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. 248(a)(1).

At the end of trial, the district court instructed the jury that, in order to find petitioners liable under the FACE Act, it would have to find (1) that the Deadly Dozen poster, the Crist poster, or the Nuremberg Files list was a "true threat" such that "a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault" (Pet. App. 33a), and (2) that each petitioner made a true threat "to intimidate or interfere with" respondents or other persons because they were providing reproductive health services (1/26/99 Tr. 19).

The jury found petitioners liable and awarded $526,336 in compensatory damages against each petitioner and a total of $108.5 million in punitive damages on the FACE Act claims. Pet. App. 7a, 46a n.4. The district court entered an injunction prohibiting petitioners from distributing or reproducing certain materials, including the Deadly Dozen and Crist posters, with the specific intent to threaten the respondents. The injunction also required petitioners to turn over all

copies of those materials in their possession, except that their attorneys were permitted to retain one copy of any item in the record. *Id.* at 13a, 43a, 181a-183a.

3. A panel of the Ninth Circuit vacated the judgment, concluding that the two posters and the Nuremberg Files were not true threats. Pet. App. 116a-125a.

4. The Ninth Circuit reheard the case en banc and affirmed the judgment of liability, the compensatory damages award, and the injunction, but remanded for a determination whether the punitive damages award comported with due process. Pet. App. 6a-52a.

The court explained that the First Amendment distinguishes between advocacy of violence, which is protected, and true threats of violence, which are not protected. Pet. App. 22a. The court defined a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id.* at 28a. The court declined to incorporate into that definition a requirement that the speaker act with the specific intent to threaten, noting that such a requirement "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate." *Id.* at 27a. The court also rejected the argument that "threatening speech made in public is entitled to heightened constitutional protection." *Id.* at 28a.

The court then concluded, based on its "independent[]" review of the record, that the Deadly Dozen poster, the Crist poster, and the Nuremberg Files "scorecard" were true threats when viewed in context. Pet. App. 39a-43a. The court noted that, by the time petitioners published the Deadly Dozen and Crist

posters, "the poster format itself had acquired currency as a death threat for abortion providers," because "Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 32a. The court found that the posters sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed," and that the message "was reinforced by the scorecard in the Nuremberg Files" noting which physicians had been killed or wounded. *Id.* at 40a. The court also found that petitioners were aware of the "fear of serious harm" generated among abortion providers who were "singled out for identification on a 'wanted'-type poster," and that petitioners "deliberately identified" the respondent physicians on such posters "to intimidate them." *Id.* at 32a, 39a-40a.

Finally, the court upheld the injunction. Pet. App. 43a-44a. The court rejected petitioners' challenge to the prohibition against possessing the Deadly Dozen poster and the Crist poster, reasoning that "[t]he First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 43a.

5. Judge Kozinski, Judge Berzon, and Judge Reinhardt filed separate dissents.

Judge Kozinski (joined by Judges Reinhardt, O'Scannlain, Kleinfeld, and Berzon) agreed with the majority's definition of a true threat, but disagreed that the definition was satisfied on the record of this case. Pet. App. 53a. He understood that definition to require that a true threat "send the message that the speakers themselves -- or individuals acting in concert with them -- will engage in physical violence." *Id.* at 56a.

Surveying the evidence, he concluded that petitioners' posters were protected expression because, at most, they could be viewed as "a call to arms for *other* abortion protesters to harm plaintiffs." *Id.* at 57a.

Judge Berzon (joined by Judges Reinhardt, Kozinski, and Kleinfeld) argued that a statement made "in the public protest context" amounts to a true threat only when the speaker subjectively intends to communicate an unequivocal threat and the statement is reasonably understood as an unequivocal threat. Pet. App. 82a-85a. She concluded that petitioners' statements were not so unequivocal as to satisfy that standard. *Id.* at 87a.

Judge Reinhardt took issue with the majority's refusal to distinguish between public and private threats. He argued that greater First Amendment protection should be accorded to threats made "in a political forum on issues of public concern" than to "[p]rivate threats delivered one-on-one." Pet. App. 52a.

DISCUSSION

The court of appeals articulated a First Amendment standard that correctly distinguishes between protected advocacy and unprotected threats. The court's definition of a "true threat" -- a communication that a reasonable speaker would foresee would be understood as a serious expression of intent to inflict bodily harm -- accords with the definition applied by other courts of appeals under various federal statutes. The United States advances that same standard in its criminal threats prosecutions.

The court of appeals did not adopt a "novel notion of actionable threats" (Pet. 12) in concluding that petitioners' posters were proscribable not because of the particular words that they used, but because of their

"wanted-style" format, which "had acquired currency as a death threat for abortion providers." Pet. App. 32a. To the contrary, the court adhered to the settled practice, reflected in this Court's decisions, of considering the entire context in which a communication is made in order to determine whether it is a true threat. The circumstances surrounding the issuance of petitioners' posters notably included the three recent murders of other abortion providers who had been the subjects of similar "wanted-style" posters. It was entirely appropriate for the court to consider whether a reasonable speaker would foresee that the posters, in that context, would be understood by the abortion providers named in them as a serious threat of bodily harm.

This case is not a suitable vehicle to address the other principal question presented by petitioners: whether, contrary to the uniform approach of the courts of appeals, the definition of a true threat should include a subjective as well as an objective component. The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.

Nor do petitioners identify any other question of general importance presented by this case. And, although reasonable judges could (and did) disagree about whether the definition of a true threat was satisfied on the record here, such disagreements do not merit this Court's review. The petition should, therefore, be denied.

1. The First Amendment does not protect "threats of violence," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), to the extent that they constitute "true" threats. *Watts* v. *United States*, 394 U.S. 705, 707-708 (1969) (per curiam). A true threat is a statement that "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 123 S. Ct. 1536, 1548 (2003). Such threats are proscribable, notwithstanding any possible political content, in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Context is crucial in determining whether a true threat has been made. The particular language used is not dispositive. Thus, the Court has recognized that "veiled threats" as well as explicit threats may constitutionally be proscribed. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). The Court has also recognized that true threats may take the form of expressive conduct such as cross burning. *Black*, 123 S. Ct. at 1549. Conversely, a statement that contains explicitly threatening language may, in context, be understood to be mere "political hyperbole." *Watts*, 394 U.S. at 708; *cf. NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

b. The court of appeals recognized that neither the Deadly Dozen poster, the Crist poster, nor the Nuremberg Files list "contains any language that is overtly threatening." Pet. App. 39a. The court also recognized, however, that a communication that is not threatening on its face may, in context, be understood as a true threat. Accordingly, the court applied a standard that considered whether a reasonable person, "in the entire

context and under all the circumstances," would foresee that the posters and list would be interpreted by respondents "as a serious expression of intent to inflict bodily harm upon [them]." *Id.* at 28a.

The court of appeals stated the correct legal standard, which is consistent with the position that the government takes in its prosecutions under various threats statutes.[2] Judge Kozinski's dissenting opinion, which was joined by all of the dissenting judges on the court of appeals, acknowledged that the standard articulated by the majority was "correct[]." Pet. App. 53a.[3]

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[2] *See, e.g.*, Gov't Br. in Opp. at 4, *Morales* v. *United States*, No. 01-8544; Gov't Br. in Opp. at 4, *Ogren* v. *United States*, No. 01-190; Gov't Br. in Opp. at 4, *Murillo* v. *United States*, No. 00-7592; Gov't Br. in Opp. at 4, *Viefhaus* v. *United States*, No. 98-8689; *see also Rogers* v. *United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) (describing government's position).

[3] Judge Kozinski's dissent took issue not with the majority's articulation of the applicable legal standard, but with its application of that standard to the evidence in the record. In particular, Judge Kozinski concluded that the evidence did not establish, as he understood the majority's standard to require, that petitioners' posters and list conveyed the message that petitioners themselves or persons acting in concert with them would inflict bodily harm on respondents. *See* Pet. App. 57a. The majority described the evidence as sufficient in that regard. *See id.* at 8a ("the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them"); *id.* at 40a ("Physicians could well believe that ACLA would make good on the threat."). Petitioners do not appear to seek review of the court of appeals' decision on the sufficiency grounds stated in Judge Kozinski's dissent. Accordingly, this case provides no occasion to consider whether a threat that an unrelated third party will commit violence against the victim may constitutionally be proscribed.

Other courts of appeals have adopted generally similar formulations.[4]

Contrary to petitioners' contention (Pet. 24), there is no conflict between the Ninth Circuit's standard and that of the Second Circuit that warrants this Court's review. The Second Circuit, like the Ninth Circuit, has adopted an objective test for threats, under which the purpose of the inquiry is to separate statements made in jest or "political hyperbole" from "true threats." *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (the government need prove only that the circumstances of the communication "were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury"). The Second Circuit has added a gloss that, to be a "true threat," the statement must be sufficiently "unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Ibid.* (quoting *United States* v. *Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976)). But there is no reason to conclude that the Second Circuit would

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[4] *See, e.g., United States* v. *Saunders*, 166 F.3d 907, 912-914 (7th Cir. 1999); *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States* v. *Malik*, 16 F.3d 45, 48 (2d Cir.), *cert. denied*, 513 U.S. 968 (1994); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States* v. *Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States* v. *Welch*, 745 F.2d 614, 619 (10th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); *cf. United States* v. *Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001). The courts of appeals mainly differ only with regard to whether the statement is considered from the perspective of a reasonable speaker or a reasonable listener. It is only in the unusual case that such a difference in approach might produce a difference in outcome.

reach any different result under that test than did the court of appeals here.[5]

2. Petitioners contend that the court of appeals erred in concluding that a true threat could result from the similarity in "format" between their "wanted-type" posters and earlier posters that preceded the murders of Drs. Gunn, Britton, and Patterson. *See* Pet. 12-21. They contend that it is "First Amendment nonsense" to suggest that the same "message" would be protected if "conveyed orally in a public speech" but not if conveyed in a "'wanted-style' poster." Pet. 14.

Petitioners' argument rests on the erroneous premise that a change in "format" cannot produce a change in "message." The choice of one format over another for presenting a message can dramatically alter the implication and meaning of words that are common to both formats. The court of appeals concluded that petitioners' choice of the "wanted-style" poster format had that effect. The court found that, by the time that petitioners chose to target the respondent physicians in

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[5] In *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 196 (2d Cir. 2001), the court of appeals indicated that certain statements made by abortion protestors to physicians who performed abortions (such as the statement, following the killing of one doctor, that "killing babies is no different than killing doctors") constituted protected expression under the *Kelner* standard. But the court distinguished that case from situations involving a "direct or even veiled threat," *id.* at 197, and it has never found speech to be protected where, as was the case with the posters here, the communications identified specific persons and the communications foreseeably generated intense fear in light of their resemblance to past similar communications naming persons who later were killed. *Cf. Francis*, 164 F.3d at 123 (emphasizing that "context of the communication" is critical); *Kelner*, 534 F.2d at 1026 (affirming conviction for a threat to kill an individual upon his arrival in New York).

"wanted-style" posters (instead of, or in addition to, public speeches), "the poster format itself had acquired currency as a death threat for abortion providers" as a result of the three recent murders. Pet. App. 32a; *see id.* at 40a (concluding that the poster format sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed").

There is nothing novel about a court's considering, as part of the context in which a communication was made, whether previous similar communications were followed by violence. It is self-evident that words or symbols that have come to be associated with violence may be particularly effective tools of intimidation. This Court recognized as much in *Virginia* v. *Black*. There, the Court explained that cross burning, "in light of [its] long and pernicious history as a signal of impending violence," is among "those forms of intimidation that are most likely to inspire fear of bodily harm." 123 S. Ct. at 1549-1550. It was for that reason that the Commonwealth was held not to have engaged in impermissible content discrimination by outlawing cross burning with the intent to intimidate without outlawing all other forms of intimidating expression. *Ibid.*

"Wanted-style" posters targeting abortion providers do not have as extensive an association with violence as does cross burning for example, at the time of the events at issue here, only three abortion providers had been killed after the issuance of posters identifying them, and other abortion providers identified in such posters had not been killed or wounded. (Nonetheless, even at a time when only three cross burnings had been followed by lynchings or other violence, and many other cross burnings had not, the target of a cross burning might reasonably have perceived a threat.) The court of appeals concluded, however, that the association was

sufficiently strong, in the wake of the three recent murders of abortion providers, to cause such posters to be understood as a serious expression of intent to inflict bodily harm. Whether or not there is room for disagreement about that conclusion, this Court does not sit to review the lower courts' application of correctly stated legal standards.

3. Petitioners further contend that the court of appeals erred in declining to incorporate into its true threats standard a requirement that the speaker "*specifically intended*" to make a threat. Pet. 22. Instead, petitioners argue, the court of appeals applied a "negligence standard." *Ibid.*; *see* Pet. 21-25. As the court of appeals recognized, however, "[o]ther circuits are in accord" with its objective standard, which considers how a statement would be understood by a reasonable speaker (or, in some cases, a reasonable listener). Pet. App. 27a; *see* note 4, *supra*. Those courts have recognized that an objective standard avoids difficult inquiries into subjective intent, and assures protection against the fear and disruption associated with statements reasonably understood as serious threats, whether or not a threat was intended. *See, e.g., United States* v. *Kosma*, 951 F.2d 549, 556-557 (3d Cir. 1991). This Court recently denied certiorari in a case challenging the objective approach. *See Morales* v. *United States*, 536 U.S. 941 (2002) (No. 01-8544).[6]

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[6] While the Court stated in *Virginia* v. *Black* that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 123 S. Ct. at 1548 (emphasis added), the Court was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both). Since the Virginia law

The case is not a suitable vehicle in which to consider whether the jury should have been required to find an intent to threaten, since the jury *was* required to find an essentially identical intent to intimidate or interfere with respondents or others. The FACE Act, the statute under which petitioners were found liable, does not prohibit threats *simpliciter*; rather, the Act prohibits "intentionally injur[ing], intimidat[ing], or interfer[ing] with" any person by, *inter alia*, the "threat of force." 18 U.S.C. 248(a)(1). The court of appeals thus understood that the FACE Act itself required that petitioners be found to have made threats with "the intent to intimidate." Pet. App. 27a, 34a. The district court's instructions to the jury were consistent with that understanding. *See* 1/26/99 Tr. 19 (instructing jury to consider whether each petitioner made "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" respondents or other persons) (quoted at Pet. App. 34a). An intent to intimidate -- defined by the district court as "to place a person in reasonable apprehension of bodily harm," 1/26/99 Tr. 19 -- is virtually identical to an intent to threaten. An intent to interfere -- defined as "to restrict[] a person's freedom of movement," *ibid.* -- is also analogous to an intent to threaten where, as here, the *actus reus* is making a "threat of force."

4. Petitioners argue (Pet. 16, 24-25) that the court of appeals' true threats standard is inconsistent with *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), which held that advocacy of violence may be proscribed only if it "is directed to inciting or producing imminent lawless action and is likely to incite or

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at issue required an intent to intimidate, the question was not squarely presented. The same is true here.

produce such action." *Brandenburg* was not, however, a threats case. This Court has never suggested that true threats should be subject to *Brandenburg's* imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression. *See Black*, 123 S. Ct. at 1547-1548.

Moreover, because the harms that justify the prohibition of incitement and true threats are different in nature, there is no reason to import an imminence requirement into the true threats analysis. Incitement may be proscribed in order to prevent violence that would erupt before passions have had time to cool. *See Brandenburg*, 395 U.S. at 448. In contrast, true threats may be proscribed in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. As Judge Berzon explained (Pet. App. 82a), those harms may be intensified and prolonged when the speaker refuses to specify when the threatened violence might be expected.

5. Nor are petitioners correct in claiming (Pet. 16-20) that the court of appeals' decision conflicts with *Claiborne Hardware*. As the court explained, while some of the statements in that case (including one that made reference to breaking necks) could have been understood as threats in some contexts, "there was no context to give" the statements "the implication of authorizing or directly threatening unlawful conduct." Pet. App. 25a. The court noted that the statements were "extemporaneous," were "surrounded by statements supporting non-violent action," did not single out specific individuals, were not similar to statements that preceded violence in the past, and were not understood by boycott violators as a serious threat of bodily harm.

Ibid. All of those considerations distinguish *Claiborne Hardware* from this case.

6. Petitioners argue (Pet. 15) that the court of appeals erred in adopting a true threats standard that does not consider whether a statement was made publicly or privately. To the contrary, the court's standard, which considers whether one would reasonably expect a statement to be understood "in the entire context" as a "serious expression of intent to inflict bodily harm," adequately accounts for distinctions between public and private speech. Pet. App. 28a. As the court recognized, "a privately communicated threat is generally more likely to be taken seriously than a diffuse public one," *id.* at 41a, and thus is generally more likely to satisfy that standard.

There is no need to alter the legal standard itself, however, to accord greater protection to "specifically targeted" threats, Pet. App. 41a, simply because they have been clothed in political rhetoric and displayed to the world at large. Indeed, such threats may inspire particularly intense fear among their victims, given the enhanced "possibility that the threatened violence will occur," *R.A.V.*, 505 U.S. at 388, if not at the speaker's hands, then at the hands of one who heard the threat.

7. None of petitioners' other challenges to the court of appeals' decision warrants review.

Petitioners claim (Pet. 25-26) that the court of appeals affirmed their FACE Act liability on a "theory" different from the one presented to the jury. The court of appeals, however, applied the same true threats standard that the jury was instructed to apply and considered the same posters and list that the jury was instructed to consider. Compare Pet. App. 28a with 1/26/99 Tr. 14-18. In any event, the claim, whether or

not meritorious, is wholly without significance outside this case.

Petitioners also contend (Pet. 26-30) that the court of appeals did not engage in "independent review" of the evidence bearing on whether their posters and list were true threats. The court of appeals explicitly stated, however, that "we review the evidence on true threats independently." Pet. App. 39a; *see id.* at 20a. The dissenting judges agreed that the majority stated the correct standard of appellate review. *Id.* at 54a.

Finally, petitioners argue (Pet. 30), in cursory fashion, that the district court's injunction is an impermissible restraint on protected speech. Petitioners' failure to articulate the precise basis for their argument is itself a sufficient reason to decline review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC., et al.	**CASE NOS. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, & 99-35405**
Plaintiffs/Appellees,	
vs.	
AMERICAN COALITION OF LIFE ACTIVITISTS, et. al.	**BEFORE LIMITED EN BANC PANEL DECISION ISSUED ON MAY 16, 2002**
Defendants/Appellants.	

APPELLANTS' JOINT MOTION TO STAY MANDATE

****

D. Good Cause Exists for the Stay.

13. A stay of the mandate will conserve the resources of the district court and the parties and will preserve the status quo pending Supreme Court consideration of this case.

14. The only issue on remand would be whether the punitive damages award should stand or be lowered, pursuant to *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). Should the Supreme Court grant Appellants' certiorari petition and reverse the decision of the six-judge majority, no hearing on, or reconsideration of, the punitive damages issue would be needed, and had such been conducted beforehand that effort by the district court and the parties would have been wasted.

Should the Supreme Court deny the certiorari petition or uphold the six judge majority's decision, then the remand for consideration of the punitive damages issue will take place at that time.

15. Likewise, enforcement of, and collection on, the judgment should wait until after the Supreme Court has finally resolved this case. Should the Supreme Court accept review of the case and reverse the six judge majority's decision, any prior effort to have enforced, and collected on, the judgment will have been wasted.

16. A stay will not prejudice Appellees, especially since the injunction of the district court will remain in force even if this Court grants a stay.

17. Thus, this Court should maintain the status quo until after the Supreme Court has fully considered this case. The application for a writ of certiorari in this case will present a substantial question, will not be legally frivolous, and will not be done merely for purposes of delay. Fed.R.App.P. 41; Ninth Cir. R. 41-1.

ACCORDINGLY, all Appellants respectfully request that this Court stay the mandate in this case pending the filing of a petition for a writ of certiorari in the United States Supreme Court and until final disposition there of the case.

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* To expedite the filing of this motion, Mr. Ferrara and Mr. Lindstedt have authorized the signing of this motion for them.

Civil No. 95-1671-JO
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL.,

Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,

Defendants.

FINAL JURY INSTRUCTIONS

January 26, 1999

****

Now, instruction number nine. As I have explained to you in the course of this trial, there is no claim, in this case, that any of the three statements, that have been listed to you—listed for you, is an incitement to violence by persons other than the defendants.

What is incitement? Incitement is speech which must be intended to produce, and is likely to produce, imminent violence or violation of law through the actions of persons other than the speaker. Imminent means following closely in time.

There is no claim, in this case, that the three statements I have listed for you have produced imminent violence against plaintiffs. Plaintiffs claim only that the three statements are threats of force, true threats, not that the statements have caused

anyone, or will cause anyone in the future, to use force against plaintiffs.

You are not to consider any evidence that the three statements allegedly "incite" violence against plaintiff. You are to consider only that the statements are "true threats," as I will now define that term for you.

****

Instruction 24, claim four, conspiracy agreement. You need not find that a particular defendant agreed to personally commit unlawful acts in order to find the defendant liable for conspiracy. Some of the defendants have contended that they should not be held liable for the alleged threats, either because they did not commit them themselves, or because they were committed before they joined the ACLA, the organization alleged to be the RICO enterprise.

However, once a defendant knowingly becomes associated with an organization and agrees with another person to participate in an organization, through a pattern of unlawful activities under RICO, he or she is liable for all violations committed by other co-conspirators, in that organizations, that were made in furtherance of that conspiracy, even though those acts may have been committed without the defendant's knowledge and even if those acts were committed before the defendant joined the conspiracy.

Now, we are going to come down to the matter of damages. Now, keep in mind, as we go through this, you have to go through your chronology. You have to first find whether plaintiff has proven true threats as has been defined. And then

we go through whether the defendants have violated either FACE or RICO.

If, then, you find that the defendants violated or conspired—have proven true threats, and you find that the defendants have violated or conspired to violate FACE or RICO, then you must find whether the violations caused any of the plaintiffs any injuries or damages and, if so, how much money will compensate for those injuries or damages.

With respect to any violation of FACE, in order for a plaintiff to recover from a defendant, the plaintiff must show, by a preponderance of the evidence, that a defendant's violation caused the plaintiff's injury or damages.

With respect to any violation of RICO, in order for a plaintiff to recover from a defendant, the plaintiff must show, by a preponderance of the evidence, that a defendant's violation of RICO or conspiracy to violate RICO caused damage specifically to the plaintiff's business or property in the nature of expenses for security measures.

An injury or damage is caused by an act whenever it appears, from the evidence, that the act played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

In other words, to find a defendant's [sic] injury or damage was caused by a defendant's conduct, you need not find that the defendant's conduct was the sole or exclusive cause.

Now we are going to talk on instruction number 26. In considering the issue of damages, if any, with respect to each individual claim alleged by each plaintiff, under FACE, you should assess the dollar amount that you find to be justified, by

a preponderance of the evidence, as just and reasonable compensation for all of the damages to that plaintiff.

In considering the issue of damages, if any, with respect to each individual claim alleged by each plaintiff under RICO, you should assess the dollar amount you find to be justified, by a preponderance of the evidence, as reasonable compensation for alleged damages to a plaintiff in his or her business or property.

In this case, economic losses are limited to those amounts incurred for security measures as a result of defendants' alleged unlawful acts.

You may not base your award of damages, if any, on speculation, because plaintiff must prove damages by a preponderance of the evidence. With respect to plaintiffs' FACE claims, plaintiffs' claims for compensatory damages include not only their out-of-pocket expenses, if any, but also damages for any mental anguish in the nature of fear or shock, and mental anguish from fear that you find a plaintiff suffered as a result of defendant's conduct. Damages for these types of personal injuries are not, however, recoverable under plaintiff's RICO claims.

You should consider the amount of damages, if any, as to each defendant, with respect to each claim under FACE and RICO separately and independently. For example, and by way of example only. If you determine that damages should be awarded a plaintiff under his or her RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by that plaintiff.

If you also determine that damages should be awarded the same plaintiff under his or her FACE claim, you should again award full, just, and reasonable compensation for damages

under the FACE claim, without regard to the damages, if any, you have awarded under his or her RICO claim. Of course, the fact that I am instructing you on damages is not meant, in any way, to suggest that you should or should not award damages. That is exclusively for you to decide.

Now, as to instruction 27, punitive damage. If you find that any plaintiff, on a FACE claim, and if you—on a FACE claim, and if you awarded compensatory damages to that plaintiff for the FACE violation, you may, but are not required to, award punitive damages against the defendant or defendants who violated FACE and are responsible for causing the plaintiff's compensatory damages.

The purposes of punitive damages are to punish a defendant or defendants and to deter them and others from committing similar acts in the future. These damages are also referred to as exemplary damages, which are awarded to set an example for certain proven misconduct.

Plaintiffs have the burden of proving that punitive damages should be awarded and the amount by a preponderance of the evidence. You may award punitive damages only if you find that a defendant's conduct, in violating FACE, was malicious or in reckless disregard of a plaintiff's rights.

Conduct is malicious if it is accompanied by ill will or spite or if it is for the purpose of injuring another. Conduct is reckless—conduce is in reckless disregard of a plaintiff's rights, if, under the circumstances, it reflects complete indifference to the safety and rights of others.

So, if you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes of punitive damages, but should not reflect bias, prejudice, or sympathy toward any party.

In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damage to any actual harm inflicted on the plaintiff. You may also consider a defendant's financial condition as a factor in determining the amount, if any, of punitive damages to be awarded as to that defendant.

As stated, you may only award punitive damages against any defendant that you have found to have violated FACE. You may impose punitive damages against one or more of the defendants and not others and may award different amounts against different defendants.

****

(admitted *pro hac vice*)
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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC. et al, Plaintiffs, vs. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	Case No. 95-1671-JO PROPOSED JURY VERDICT FORM SUBMITTED ON BEHALF OF ALL REMAINING DEFENDANTS

Christopher A. Ferrara, Esq., on behalf of all defense counsel, hereby submits the following proposed jury verdict form.

I hereby certify that a true copy of said form was hand-delivered to opposing counsel on January 24, 1999, and that a further copy (with typographical errors corrected) was hand-delivered to opposing counsel in open court on January 25, 1999.

Dated: January 25, 1999

/s/ Christopher A. Ferrara
Christopher A. Ferrara
Attorney for Defendant
Donald J. Treshman

SECTION V.

CAUTION:
THE FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY IF YOU HAVE ALREADY ANSWERED "YES" TO AT LEAST ONE OF THE QUESTIONS IN SECTION II.

Claim under FACE

24. Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the "Deadly Dozen" poster? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

25.Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the Crist poster? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

26.Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the Nuremberg Files? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

Claim Under RICO

27.Do you find that any of the following defendants violated or conspired to violate RICO by engaging in extortion or attempted extortion by means of the "Deadly Dozen" poster? If so, specify which defendants:

	Yes	No
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

28.Do you find that any of the following defendants violated or conspired to violate RICO by engaging in extortion or attempted extortion by means of the Crist poster? If so, specify which defendants:

	Yes	No

SECTION VI

CAUTION:
THE FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY IF YOU HAVE ALREADY FOUND THAT THIS DEFENDANT VIOLATED OR CONSPIRED TO VIOLATE RICO OR FACE AS TO AT LEAST ONE PLAINTIFF

DEFENDANT: AMERICAN COALITION OF LIFE ACTIVISTS

30. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

31. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

32. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

33. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: ADVOCATES FOR LIFE MINISTRIES

CLAIM UNDER FACE

34. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

35. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

36. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

37. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: ANDREW BURNETT

46. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

47. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

48. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

49. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DAVID CRANE

58. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

59. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

60. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

61. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: MICHAEL DODDS

70. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

71. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Rebert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

72. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

73. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: TIMOTHY PAUL DRESTE

82. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

83. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

84. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

85. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: JOSEPH L. FOREMAN

94. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

95. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

96. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

97. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CHARLES ROY McMILLAN

106. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

107. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

108. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

109. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: BRUCE EVAN MURCH

118. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

119. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette	$_____
Portland Feminist Women's Health Center	$_____
Robert Crist, M.D.	$_____
Warren M. Hern, M.D.	$_____
Elizabeth Newhall, M.D.	$_____
James Newhall, M.D.	$_____

120. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

121. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CATHERINE RAMEY

130. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

131. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

132. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

133. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DAWN STOVER

142. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

143. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

144. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

145. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DONALD TRESHMAN

154. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

155. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette	$_____
Portland Feminist Women's Health Center	$_____
Robert Crist, M.D.	$_____
Warren M. Hern, M.D.	$_____
Elizabeth Newhall, M.D.	$_____
James Newhall, M.D.	$_____

156. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

157. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CHARLES WYSONG

166. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

167. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

168. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

169. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

The foregoing is the unanimous verdict of this Jury.

DATED this day of January, 1999, at Portland, Oregon.

_____

Foreperson

Michael H. Simon, OSB No. 86090
Chin See Ming, OSB No. 94494
Anthony Gould, OSB No. 97512
Paul A. Garrahan, OSB No. 98055
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Attorneys for ACLU Foundation of Oregon, Inc., *Amicus Curiae*

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., et al., Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	CASE NO. 95-1671-JO PROPOSED JURY INSTRUCTIONS SUBMITTED BY THE ACLU FOUNDATION OF OREGON, INC., *AMICUS CURIAE*

The American Civil Liberties Union Foundation of Oregon, Inc. ("ACLU"), as *amicus curiae*, hereby submits the following proposed jury instructions pursuant to the request of the Court.

DATED this 23rd day of November, 1998.

Respectfully submitted,

PERKINS COIE LLP and the
ACLU FOUNDATION OF
OREGON, INC.

By: /s/ Michael H. Simon
Michael H. Simon, OSB No. 86090
Chin See Ming, OSB No. 94494
Anthony Gould, OSB No. 97
Paul A. Garrahan, OSB No. 98055
Attorneys for ACLU Foundation of
Oregon, Inc., *Amicus Curiae*

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ACLU PROPOSED JURY INSTRUCTIONS
No. 8. Conspiracy to Violate FACE

The plaintiffs have also alleged that the defendants have conspired to violate FACE. In order for a defendant to be found to have conspired to violate FACE, you must find by a preponderance of the evidence that:

First, beginning on or about [insert date], and ending on or about [insert date], there was an agreement between two or more persons to violate FACE (as defined and described a moment ago);

Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy — and all jurors must agree on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of partnership — an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the underlying violation which the conspirators agreed to commit was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the violations alleged

by the plaintiffs as an object of the conspiracy with all of you agreeing as to the particular violation which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The plaintiffs are not required to prove that the defendants personally did one of the overt acts. Once you have decided that the a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did.

See Ninth Circuit Model Criminal Jury Instruction 8.5.1; 18 U.S.C. § 371.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 14. Federal RICO — Alleged Racketeering Activity (Extortion) Under 18 U.S.C § 1951

The plaintiffs allege that the defendants have committed extortion in violation of Section 1951 of Title 18 of the United States Code. Each violation of this statute is a predicate act of racketeering activity. In order for you to find that a defendant violated this statute, the plaintiffs must prove by a preponderance of the evidence that:

First, the defendant caused a plaintiff to part with his or her property or protected rights by the wrongful use or threat of force or fear, which threats you must have found above to have been "true threats";

Second, the defendant acted with intent to so deprive a plaintiff of such property or protected rights; and

Third, commerce from one state to another was or would have been affected in some way.

See generally Ninth Circuit Model Criminal Jury Instructions 8.31 1; 18 USC § 1951.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 38. Damages — Proximate Cause

If you find that any defendants have violated FACE, federal RICO, or ORICO, then you must determine whether such violations caused any of the plaintiffs any injuries and, if so, how much. With respect to any such violation of FACE, in order for a plaintiff to recover from a defendant, the plaintiff must show by a preponderance of the evidence that a defendant's violations were the proximate cause of the plaintiff's injury. With respect to any such violation of federal RICO or ORICO, in order for a plaintiff to recover from a defendant, the plaintiff must show by a preponderance of the evidence that a defendant's violations were the proximate cause of injury specifically to the plaintiffs business or property.

An injury or damage is proximately caused by an act whenever it appears from the evidence in the case that the act played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

See 3 Fed. Jury Practice and Instr. Civil § 100.10.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 40. Punitive Damages — FACE

If you find for any plaintiff on a FACE claim, and if you award that plaintiff compensatory damages for such a violation, you may, but are not required to, award punitive damages against the defendants who have violated FACE and who are responsible for causing such damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Under FACE, plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct in violating FACE was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiffs rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

Punitive damages under FACE may not be awarded against any defendant that you have found not to have violated FACE. You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.

See Ninth Circuit Model Civil Jury Instruction 7.5; 18 U.S.C. § 248(c)(1)(B).

****

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC. et al, Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	)	Case No. 95-1671-JO REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS SUBMITTED ON BEHALF OF DEFENDANTS DONALD TRESHMAN AND MONICA MILLER

****

TRESHMAN/MILLER REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS
No. 24 - Conspiracy to Violate FACE And Attempt to Violate Face

These defendants adopt ACLU proposed instruction No. 8 (See authorities cited therein), with the following modification:

> The phrase "Once you have decided that a defendant as a member of a conspiracy . . ." should be replaced with "*If* you *find* that a defendant was a member of a conspiracy . . ."

In considering the jury instructions regarding 'conspiracy', I caution you that you cannot find defendants liable for conspiracy to violate FACE unless you first find that at least one of the documents at issue—the two posters and the Internet file—was a true threat to kill or injure the plaintiffs. Defendants cannot be found liable for a conspiracy to issue statements which are protected by the First Amendment.

In considering whether any defendant attempted to violate FACE, I likewise caution you that you cannot find defendants liable for an attempt to violate FACE unless you first find that at least one of the documents at issue—the two posters and the Internet file—was a true threat to kill or injure. If the statement is not a true threat to kill or injure, then you must find that it is speech protected by the First Amendment. It cannot be an attempted threat.

Comment: These revised and supplemented instructions on conspiracy and attempt liability under FACE (and RICO, see *infra*) are submitted by defendants because of the danger of an erroneous verdict brought about by a misapplication of the concepts of conspiracy and attempt in the context of pure speech. In the context of speech, the concepts of conspiracy and attempt have the serious potential to lead the jury to find defendants liable even if the jury does not believe that the three documents at issue constituted "true threats".

Example 1: The jury might conclude that Defendant "A" did not utter a true threat, but still erroneously conclude that Defendant "A" made an offensive remark which was part of a "conspiracy" to irritate, annoy or "intimidate" the plaintiffs.

Example 2: The jury might believe that defendant "A" did not utter a true threat, but might still erroneously conclude that defendant "A" made an offensive remark (protected by the First Amendment) which was an unsuccessful "attempt" to utter a true threat.

In other words, this court's instructions based on the protections of the First Amendment could easily be undermined if the jury misapplies such collateral concepts conspiracy and attempt—and also "overt acts", as discussed *infra*.

Defendants regret the need for these extra instructions. However, it is the plaintiffs who have chosen to base alternative theories in this case upon attempt, conspiracy, etc. in the realm of pure speech. The resulting complexity is added to the already complex scenario wherein the jury will hear numerous "contextual" statements of both parties and non-parties and be required to distinguish between contextual and non-contextual statements.

With all due respect, defendants suggest that, as with the dropping of their ORICO claims, plaintiffs may wish to simplify this case by abandoning alternative theories based upon attempt and conspiracy. Otherwise, the jury will be receiving numerous instructions in extremely complex areas of civil law which even law students would find highly challenging. Yet, given this unprecedented case, such instructions are absolutely necessary to prevent a First Amendment violations by the jury.

****

TRESHMAN/MILLER REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS
No. 30 - RICO - Alleged Racketeering Activity (Extortion) Under 18 U.S.C. Sec. 1951

In order for plaintiffs to prevail on their RICO claim, they must prove by a preponderance of evidence that each defendant violated a federal criminal Statute known as the Hobbs Act. Each proven violation of the Hobbs Act would constitute one of the "predicate acts" required to prove a RICO claim.

In order for you to find that a defendant violated the Hobbs Act, the plaintiffs must prove by a preponderance of the evidence that:

First, the defendant caused a plaintiff to part with his or her property or protected rights by the wrongful use of threat of force, which threats you must have found above to have been "true threats";

Second, that the defendant acted with the specific intent to so deprive a plaintiff of such property or protected rights; and

Third, that commerce from one state to another was or would have been affected in some way. [Adapted with modifications from ACLU proposed instruction No. 14 [See authorities cited therein, as well as this Court's ruling on requirement of proof of specific intent to commit extortion in violation of the Hobbs Act.]

****

Dated: December 21, 1998

Respectfully Submitted,
American Catholic Lawyers Assoc., Inc.

By /s/ Christopher A. Ferrara, Esq.

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(2)

SUPREME COURT, U.S.
FILED

No. 05-1083 FEB 21 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
Volume II, Pages 200 to 444

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APPENDIX

Page

Volume I

Decision of the Court of Appeals for the Ninth Circuit (Sept. 6, 2005).....App. 1

Amended Judgment on Remand of the United States District Court, District of Oregon (Feb. 17, 2004).....App. 43

Opinion and Order of the United States District Court, District of Oregon (Jan. 28, 2004).....App. 44

Order of the United States Supreme Court (June 27, 2003).....App. 66

Decision of the Court of Appeals for the Ninth Circuit (May 16, 2002).....App. 67

Order of the Court of Appeals for the Ninth Circuit (Oct. 3, 2001).....App. 196

Volume II

Decision of the Court of Appeals for the Ninth Circuit (March 28, 2001).....App. 200

Judgment of the United States District Court, District of Oregon (March 13, 2000).....App. 222

Decision of the United States District Court, District of Oregon (March 16, 1999).....App. 226

Order and Permanent Injunction of the United States District Court, District of Oregon (Feb. 25, 1999).....App. 293

Opinion and Order of the United States District Court, District of Oregon (Oct. 14, 1998).....App. 301

Decision of United States District Court, District of Oregon (Sept. 18, 1996).....App. 333

APPENDIX – Continued

Page

Order of the Court of Appeals for the Ninth Circuit (Oct. 26, 2005) ..... App. 402

FACE, 18 U.S.C. § 248 ..... App. 404

Hobbs Act, 18 U.S.C. § 1951 ..... App. 409

RICO, 18 U.S.C. §§ 1961, 1962 ..... App. 410

Selected Final Jury Instructions ..... App. 416

Verdict ..... App. 429

244 F.3d 1007

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L. Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette Inc.;

Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Michael Dodds; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman, Defendants,
and
Timothy Paul Dreste; Joseph L. Foreman; Charles Wysong, Defendants-Appellants.
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and
Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Donald Treshman; Charles Wysong, Defendants.
Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
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American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.
Paul deParrie, Movant-Appellant.
Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35331, 99-35325, 99-35333, 99-35327, 99-35405.

Argued Sept. 12, 2000
Submitted Sept. 15, 2000*

Filed March 28, 2001

Christopher A. Ferrara, American Catholic Lawyers Association Inc., Ramsey, New Jersey, argued the cause for

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* Following oral argument, we deferred submission and encouraged the parties to settle. We asked the parties to notify us within 48 hours if negotiations were progressing and more time was needed. Having heard nothing by close of business on September 14, 2000, we ordered the case submitted.

all Appellants, and submitted a brief on behalf of appellant Donald J. Treshman.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, argued the cause for Appellees.

Stephen J. Safranek, Richard Thompson, Edward L. White III, Thomas More Center for Law & Justice, Ann Arbor, Michigan, for Appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray and Dawn Stover.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Virginia, in support of reversal.

Paul deParrie, Portland, Oregon, amicus, in support of reversal.

Michael H. Simon, Perkins Coie LLP, Portland, Oregon, for amicus curiae ACLU Foundation of Oregon, Inc., in support of affirmance.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center For Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project, in support of affirmance.

Richard Blumenthal, Attorney General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington, in support of affirmance.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae, Anti-Defamation League, the American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc., in support of affirmance.

Appeal from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ.

Before: KOZINSKI and KLEINFELD, Circuit Judges, and SCHWARZER, District Judge.**

KOZINSKI, Circuit Judge:

Anti-abortion activists intimidated abortion providers by publishing their names and addresses. A jury awarded more than $100 million in actual and punitive damages against the activists, and the district court enjoined their speech. We consider whether such speech is protected by the First Amendment.

I

During a 1995 meeting called to mark the anniversary of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

** The Honorable William W Schwarzer, United States Senior District Judge for the Northern District of California, sitting by designation.

(1973), the American Coalition of Life Activists (ACLA) unveiled a poster listing the names and addresses of the "Deadly Dozen," a group of doctors who perform abortions. In large print, the poster declared them guilty of "crimes against humanity" and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." The poster was later published in an affiliated magazine, *Life Advocate,* and distributed at ACLA events.

Later that year, in front of the St. Louis federal courthouse, ACLA presented a second poster, this time targeting Dr. Robert Crist. The poster accused Crist of crimes against humanity and various acts of medical malpractice, including a botched abortion that caused the death of a woman. Like the Deadly Dozen List, the poster included Crist's home and work addresses, and in addition, featured his photograph. The poster offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines" (which prohibit violence).

In January 1996, at its next *Roe* anniversary event, ACLA unveiled a series of dossiers it had compiled on doctors, clinic employees, politicians, judges and other abortion rights supporters. ACLA dubbed these the "Nuremberg Files," and announced that it had collected the pictures, addresses and other information in the files so that Nuremberg-like war crimes trials could be conducted in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." ACLA sent hard copies of the files to Neal Horsley, an anti-abortion activist, who posted the information on a

website.[1] The website listed the names of doctors and others who provide or support abortion and called on visitors to supply additional names.[2] The website marked the names of those already victimized by anti-abortion terrorists, striking through the names of those who had been murdered and graying out the names of the wounded. Although ACLA's name originally appeared on the website, Horsley removed it after the initiation of this lawsuit.

Neither the posters nor the website contained any explicit threats against the doctors. But the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them. The doctors responded to this unwelcome attention by donning bulletproof vests, drawing the curtains on the windows of their homes and accepting the protection of U.S. Marshals.

Some of the doctors went on the offensive. Along with two Portland-based health centers, the doctors sued

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[1] Plaintiffs did not sue Horsley, but the district court concluded that Horsley was an agent of ACLA and other defendants as well as a co-conspirator. *See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130, 1152 (D.Or.1999). In addition, the court found that the defendants came up with the idea for the webpage and sent Horsley much of its content. *See id.* at 1152-53.

[2] In addition to plaintiffs, the Nuremberg Files website identifies dozens of clinic employees and public figures as abortion supporters (and future war crimes defendants), including six current members of the Supreme Court, Bill Clinton, Al Gore, Janet Reno, Jack Kevorkian, C. Everett Koop, Mary Tyler Moore, Whoopi Goldberg and, for reasons unknown, Retired Justice Byron White. *See Roe v. Wade*, 93 S.Ct. 762, 410 U.S. 179, 221, 35 L.Ed.2d 147 (White, J., dissenting).

ACLA, twelve activists and an affiliated organization, alleging that their threatening statements violated state and federal law, including the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248.[3] Because the doctors claimed they were harmed by defendants' speech, the district court instructed the jury that defendants could only be liable if their statements were "true threats" and therefore unprotected by the First Amendment.[4] In a special verdict, the jury found that all the statements were true threats and awarded the doctors $107 million in actual and punitive damages.[5] The district court then issued an injunction barring defendants from making or distributing the posters, the webpage or anything similar. ACLA and the other defendants appeal,

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[3] Specifically, they alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, the Oregon Racketeer Influenced and Corrupt Organizations Act, Or.Rev.Stat. § 166.720, and the state tort of intentional infliction of emotional distress. The state law claims were abandoned before trial, and the district court submitted to the jury only the FACE and RICO claims.

[4] We call statements "true threats" to distinguish them from statements that are threatening on their face but could only be understood, under the circumstances, as hyperbole or jokes. For example, in *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam), the Supreme Court held that the defendant's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was not a true threat. *Id.* at 706, 708, 89 S.Ct. 1399 (internal quotation marks and citation omitted). It was instead "political hyperbole . . . a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399 (internal quotation marks omitted).

[5] The jury held that defendants Michael Bray and Donald Treshman were not liable under RICO. Although the district court had previously found Bray in default because of his refusal to comply with discovery orders, the court later set aside the default and entered judgment against Bray on the FACE claim based on the verdict.

claiming that their statements are protected by the First Amendment.[6]

II

A. Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by non-violent participants in these movements acquired a tinge of menace.

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[6] In No. 99-35333, Paul deParrie, a non-party, moves to intervene in the appeal because he was enjoined as an employee and agent of one of the defendant organizations, the Advocates for Life Ministries (ALM). *See* Fed.R.Civ.P. 65(d). deParrie relies on *Keith v. Volpe*, 118 F.3d 1386, 1391 (9th Cir.1997), but that case dealt with a situation where a non-party sought to appeal a judgment that would not otherwise have been appealed by the parties. The question then was whether someone who is not a party might take the legally operative step of filing a notice of appeal. Here, all of the losing parties have appealed and deParrie's proposed participation is in the nature of an amicus. We therefore construe deParrie's motion as one to participate as an amicus curiae and grant it.

In No. 99-35320 and No. 99-35405, a former defendant, Monica Migliorino Miller, filed a notice of appeal of the injunction with which the district court ordered she be served. At plaintiffs' request, the district court had dismissed Miller from the suit before trial and so she was not herself enjoined. The injunction applies to her only insofar as she is an agent or employee of defendants, and so she has no independent standing to appeal. Her notice of appeal is therefore ordered stricken.